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No. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ADRIAN J. MASTRANGELO,

Petitioner,

—v.—

UNITED STATES PAROLE COMMISSION, and WARDEN DALE THOMAS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether a special parole sentence can run concurrently with another sentence?

2. Whether an ambiguity in a criminal sentence should be resolved in favor of a criminal defendant?

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Statement of Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	4
I. The Court of Appeals Erred in Holding That a Special Parole Sentence Cannot Run Concurrently With Another Sentence	4
II. The Court of Appeals Should Have Resolved the Ambiguity in Petitioner's Sentence in Favor of Petitioner	9
Conclusion	13
APPENDIX	
Memorandum and Order of the United States District Court for the Southern District of New York (December 23, 1981)	1a
Opinion of the United States Court of Appeals for the Second Circuit (June 30, 1982)	4a

TABLE OF AUTHORITIES

Cases

Allen v. *Ciccone*, 425 F.2d 989 (8th Cir. 1970)	9
Bifulco v. *United States*, 447 U.S. 381 (1980)	11
Borum v. *United States*, 409 F.2d 433 (D.C. Cir. 1967), *cert. denied*, 395 U.S. 916 (1969)	10

PAGE

Buie v. *King*, 137 F.2d 495 (8th Cir. 1943) 10
Burch v. *United States*, 359 F.2d 69 (8th Cir. 1966) 6
Domer v. *Smith*, 412 F.2d 199 (7th Cir.), *cert. denied*, 396 U.S. 948 (1969) 9
Edwards v. *United States*, 574 F.2d 937 (8th Cir.), *cert. dismissed*, 439 U.S. 1040 (1978) 6
Gaddis v. *United States*, 280 F.2d 334 (6th Cir. 1960) 10
Green v. *Ten Eyck*, 572 F.2d 1233 (8th Cir. 1978) 7
Henley v. *Heritage*, 337 F.2d 847 (5th Cir. 1964) 9
Hunter v. *Martin*, 334 U.S. 302 (1948) 9
In re Liberatore, 574 F.2d 78 (2d Cir. 1978) 12
Ladner v. *United States*, 358 U.S. 169 (1958) .. 11
Marano v. *United States*, 374 F.2d 583 (1st Cir. 1967) 6
McNealy v. *Johnston*, 100 F.2d 280 (9th Cir. 1938) 10
Mills v. *Hunter*, 204 F.2d 468 (10th Cir. 1953) .. 10
Muniz v. *Hoffman*, 422 U.S. 454 (1975) 6
Neely v. *United States*, 2 F.2d 849 (4th Cir. 1924) 10
Robinson v. *McCune*, 536 F.2d 1340 (10th Cir. 1976) 7
Schultz v. *United States*, 384 F.2d 374 (5th Cir. 1967) 10
Shea v. *Vialpando*, 416 U.S. 251 (1974) 7
Simpson v. *United States*, 435 U.S. 6 (1978) 11
State ex rel. O'Connor v. *Williams*, 95 Wis. 2d 378, 290 N.W.2d 533 (Wis. Ct. App. 1980) 9
State ex rel. Otterstetter v. *McManus*, 309 Minn. 68, 243 N.W.2d 730 (1976) 9

PAGE

Townsend v. *Swank*, 404 U.S. 282 (1971) 7

United States v. *Daugherty*, 269 U.S. 360 (1926) 9, 10

United States v. *Davis*, 656 F.2d 153 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1979 (1982) .. 8, 10

United States v. *Del Toro*, 513 F.2d 656 (2d Cir.), *cert. denied*, 423 U.S. 826 (1975) 6

United States v. *Mearns*, 599 F.2d 1296 (3rd Cir. 1979), *cert. denied*, 447 U.S. 934 (1980) 11

United States v. *Miller*, 589 F.2d 1117 (1st Cir. 1978), *cert. denied*, 440 U.S. 958 (1979) 6

United States v. *Pratt*, 657 F.2d 218 (8th Cir. 1981) 10

United States v. *Ryder*, 110 U.S. 729 (1884) 6

United States v. *Wenger*, 457 F.2d 1082 (2d Cir.), *cert. denied*, 409 U.S. 843 (1972) 10

Whalen v. *United States*, 445 U.S. 684 (1980) 11

Statutes and Regulations

18 U.S.C. § 4042 6

18 U.S.C. § 4161 6

18 U.S.C. § 4210 8

21 U.S.C. §§ 801-966 2

21 U.S.C. § 841 .....4, 5, 11

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2241 3

28 C.F.R. § 2.57 (1981) 2, 5, 11

Miscellaneous Material

Bureau of Prisons Policy Statement No. 5330.3 § 5(b) 5, 6

H.R. Rep. No. 1444, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 5, 7, 8, 9, 12

IN THE

Supreme Court of the United States

October Term, 1981

No. 81-

ADRIAN J. MASTRANGELO,

Petitioner,

—v.—

UNITED STATES PAROLE COMMISSION
and WARDEN DALE THOMAS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Adrian J. Mastrangelo respectfully prays that a Writ of Certiorari issue to review the Order entered in this action on June 30, 1982 by the United States Court of Appeals for the Second Circuit.

Opinions Below

The Opinion of the United States Court of Appeals for the Second Circuit is not yet reported. It is reprinted in the Appendix at pages 4a-11a. The unreported Memorandum and Order of the District Court is also reproduced in the Appendix at pages 1a-3a.

Statement of Jurisdiction

This is an appeal from the June 30, 1982 decision of the United States Court of Appeals for the Second Circuit reversing the Order of the United States District Court for the Southern District of New York which granted petitioner a writ of habeas corpus. On July 19, 1982 the Court of Appeals entered an Order staying the issuance of its mandate pending petitioner's application for a Writ of Certiorari. Since this petition is filed within 90 days of June 30, 1982, this Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

This petition raises issues concerning the propriety of certain practices and procedures of the United States Parole Commission under the Fifth Amendment of the United States Constitution.

Statement of the Case

This is a case of first impression in this Court involving the construction of a statute and regulations promulgated thereunder which affect criminal defendants sentenced under the Drug Abuse Prevention and Control Act, 21 U.S.C. §§ 801-966 (1981) ("the Act"). At issue is the proper interpretation of the section of the Act which makes provision for the imposition of a *"special parole term"*. The special parole term is a period of supervision which commences on the completion of a sentence imposed under the Act and is in addition to any period of parole on the underlying sentence. 28 C.F.R. § 2.57 (1981). Significantly, the Act and the regulations promulgated thereunder do not specify the manner in which a special parole term operates in relation to subsequent criminal sentences.

Thus, criminal sentences imposed pursuant to the Act become ambiguous in those cases in which the sentencing judge fails to specify whether a subsequent sentence is to run consecutively to or concurrently with the term of special parole. Petitioner's sentence was defective in this respect and it is the ambiguity in petitioner's sentence that occasions this petition.

A. Statement of Facts

On January 12, 1976 petitioner was sentenced to imprisonment "for a period of 2½ years, followed by a period of special parole as provided by statute of 2 years." App. at 1a. Shortly thereafter, on March 4, 1976, petitioner was convicted in the same court of illegal possession of a firearm and sentenced to prison for one and one-half years. The court directed that the firearm sentence run *consecutively* to the sentence imposed on January 12, 1976 but made no reference to the special parole term. App. at 1a. The consecutive prison terms aggregated four years commencing January 12, 1976. App. at 1a.

On October 7, 1977 petitioner was paroled. App. at 2a. In May 1981, almost four years after petitioner was paroled and more than one year after the full term of petitioner's second sentence had expired, petitioner was arrested and returned to prison for an alleged violation of special parole. App. at 2a. Petitioner contends that at the time of his arrest he was unaware that he was on special parole.

B. History of the Case

Petitioner's application for a writ of habeas corpus was granted pursuant to 28 U.S.C. § 2241 on December 23, 1981. In granting petitioner's application for a writ of habeas corpus, the district court found that petitioner's special parole had run concurrently with his second prison

sentence and that, accordingly, both sentences had been fully served prior to May 1981.* On June 30, 1982 the Court of Appeals vacated the district court's order and judgment, holding that the district court erred when it found that petitioner's sentence was ambiguous with respect to the operation of his special parole term. Petitioner secured a stay of the Court of Appeals' mandate pending consideration by this Court of this petition.

Petitioner submits that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned a departure by the district courts which will consider numerous similar pending cases, as to call for the exercise of this Court's power of supervision.

Reasons for Granting the Writ

I.

The Court of Appeals Erred in Holding That a Special Parole Sentence Cannot Run Concurrently With Another Sentence.

A. There Is No Authority for the Interpretation of Special Parole Terms Adopted by the Court of Appeals

Section 841(b) of Title 21 of the United States Code ("Section 841(b)"), the statute under which petitioner

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* As the district court recognized, the sequence of the two sentences can be interpreted three different ways. First, read literally, petitioner would serve his prison term and special parole on the first sentence and then return to prison for his second term. Second, petitioner would serve both prison terms and then be placed on special parole at the end of the aggregate confinement. And third, the second prison term would run concurrently with the special parole term on the first prison sentence. As set forth, *infra*, at pages 9-10, the ambiguity in petitioner's sentence should be resolved in petitioner's favor.

was sentenced, provides in pertinent part that "[a]ny sentence imposing a term of imprisonment under this paragraph shall . . . impose a special parole term . . . in addition to such term of imprisonment . . . ." The statute does not specify the effect that any other term of imprisonment might have on a special parole sentence entered pursuant to section 841.*

The regulation implementing section 841(b) states:

> "The Drug Abuse Prevention and Control Act, 21 U.S.C. Sections 801 to 966, provides that, on conviction of certain offenses, mandatory 'special parole terms' must be imposed by the court *as part of the sentence. This term* is an additional period of supervision which *commences upon completion of any period on parole* or mandatory release supervision *from the regular sentence;* or if the prisoner is released without supervision, commences upon such release."

28 C.F.R. § 2.57(a) (1981) (emphasis added) ("the regulation"). The plain meaning of this regulation is that the special parole term commences at the termination of the term of imprisonment and parole on the underlying offense.

Relying upon a policy statement by the Bureau of Prisons, the Court of Appeals held that the second sentencing judge must have intended that petitioner's special parole term would follow his aggregate consecutive prison sentences. App. at 8a. *See* Bureau of Prisons Policy Statement No. 5330.3 § 5(b). However, in reversing the order granting petitioner a writ of habeas corpus, the Court of Appeals departed from the plain meaning of the regulation.

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* *See also* H.R. Rep. No. 1444, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News at 4614 ("A special parole term . . . is imposed in addition to any prison term under this paragraph . . . .")

Adherence to the policy that the judiciary refrain from construing a statute or regulation in a manner which is at odds with its obvious meaning is especially important where, as here, the result of a failure to do so deprives one of his liberty. As this Court stated in *Muniz* v. *Hoffman*, 422 U.S. 454, 470 (1975): "[t]o read a substantial change in accepted practice into a revision of the Criminal Code without any support in the legislative history of that revision is insupportable." *See also United States* v. *Ryder*, 110 U.S. 729, 740 (1884) ("It will not be inferred that the legislature . . . intended to change their policy, unless such intention be clearly expressed").

Moreover, the Court of Appeals' reliance on the Bureau of Prisons Policy Statement is misplaced for several reasons. First, it is well settled that sentencing is a function exclusively vested in the judiciary. *United States* v. *Del Toro*, 513 F.2d 656, 666 (2d Cir.), *cert. denied*, 423 U.S. 826 (1975); *see United States* v. *Miller*, 589 F.2d 1117, 1138-39 (1st Cir. 1978), *cert. denied*, 440 U.S. 958 (1979); *Edwards* v. *United States*, 574 F.2d 937, 946 (8th Cir.), *cert. dismissed*, 439 U.S. 1040 (1978); *Marano* v. *United States*, 374 F.2d 583, 586 (1st Cir. 1967). Indeed, it has been held that the question "[w]hether the sentence was to be concurrently served along with the period of parole was . . . a matter solely in the discretion of the trial judge." *Burch* v. *United States*, 359 F.2d 69, 73 (8th Cir. 1966). In short, the Bureau of Prisons is without any authority to promulgate rules or to interpret statutes regarding such matters.*

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* The limited powers of the Bureau are enumerated in 18 U.S.C. § 4042 and provide absolutely no authority for Bureau of Prisons Policy Statement No. 5330.3 § 5(b). Moreover, the Court of Appeals' suggestion that authority for the Bureau's interpretation may be found in its power to aggregate consecutive sentences pursuant to 18 U.S.C. § 4161, *see* App. at 8a, is clearly erroneous:

(footnote continued on following page)

Second, this Court has made it clear that the principle of according deference to administrative interpretation "applies only where the relevant statutory language is unclear or susceptible of differing interpretations." *Shea* v. *Vialpando*, 416 U.S. 251, 262 n.11 (1974); *accord Townsend* v. *Swank*, 404 U.S. 282, 286 (1971); *Green* v. *Ten Eyck*, 572 F.2d 1233, 1241 (8th Cir. 1978). Where, as here, "[t]he literal import of [a statute] is confirmed by the statute's legislative history," *Shea* v. *Vialpando, supra*, 416 U.S. at 263, there is no place for an administrative interpretation which is at odds with the unambiguous meaning of the statute.

B. The Holding Below Is Contrary to the Policies Underlying Special Parole

In deciding this case, the Court of Appeals has held that in all cases in which sentences are aggregated and one of the sentences carries with it a term of special parole, the the special parole term must be served at the expiration of the aggregated sentence. This position is directly contrary to the stated purpose of Congress in adopting the special parole concept as a part of "an overall balanced scheme of criminal penalties for offenses involving drugs." H.R. Rep. No. 1444, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News at 4567.

Prior to the adoption of the Act in 1970, "[t]he severity of existing penalties, involving in many instances minimum mandatory sentences . . . led in many instances to re-

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(footnote continued from preceding page)

> "The Bureau of Prisons' authority to aggregate consecutive sentences is plainly limited by § 4161 to good time credit computation matters. Any expansion of that authority, administratively, cannot be reconciled with the clear, unambiguous language of the statute."

Robinson v. *McCune*, 536 F.2d 1340, 1342 (10th Cir. 1976).

luctance on the part of prosecutors to prosecute some violations, where the penalties seeem[ed] to be out of line with the seriousness of the offense." *Id.* at 4576. Congress sought to eliminate this rigidity and stated its belief that "making the penalty structure in the law more flexible can actually serve to have a more deterrent effect than existing penalties . . . ." *Id.; United States* v. *Davis,* 656 F.2d 153, 159 (5th Cir. 1981), *cert. denied,* 102 S. Ct. 1979 (1982). The Court of Appeals' holding removes this flexibility from the law.

The Court of Appeals correctly observed that special parole "is designed to test the offender's ability to lead a lawful life in the community" and that it "provides an additional incentive for the parolee to lead a lawful life in the community for an extended period of time . . . ." App. at 8a-9a. However, neither of these purposes is served by woodenly applying a rule requiring special parole to be served separately from imprisonment and parole on other unrelated sentences. Indeed, both of these purposes were fully satisfied in the present case where petitioner served his special parole term while at liberty.*

Moreover, serving parole from one sentence while being incarcerated on another sentence is not an uncommon result of multiple sentences. It has uniformly been held in those cases in which a prisoner is to serve consecutive sentences under judgments from different jurisdictions that the second sentence commences running upon the prisoner's release on parole from the first sentence, and the term of parole is

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* Petitioner was concededly on parole (as opposed to special parole) from October 7, 1977 to January 8, 1980. Thus, petitioner could be deemed to have served the initial portion of his special parole concurrently with the parole sentence on his second offense. *See* 18 U.S.C. § 4210(d) ("The parole of any parolee shall run concurrently with the period of parole or probation under any other Federal, State or local sentence.")

served concurrently with the period of incarceration on the second sentence. *See Hunter* v. *Martin*, 334 U.S. 302 (1948); *Allen* v. *Ciccone*, 425 F.2d 989 (8th Cir. 1970); *Domer* v. *Smith*, 412 F.2d 199 (7th Cir.), *cert. denied*, 396 U.S. 948 (1969); *see also State ex rel. O'Conner* v. *Williams*, 95 Wis. 2d 378, 290 N.W.2d 533 (Wis. Ct. App. 1980); *State ex rel. Otterstetter* v. *McManus*, 309 Minn. 68, 243 N.W.2d 730 (1976). Prior to the entry of the opinion below, no case held that concurrent service of special parole with a term of imprisonment on another sentence violates the purpose of special parole. The decision below ignores the congressional intent behind Section 841(b) which is to "give maximum flexibility to judges, permitting them to tailor the period of imprisonment, as well as the fine, to the circumstances involved in the individual case." H.R. Rep. No. 1444, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News at 4576.

II.

The Court of Appeals Should Have Resolved the Ambiguity in Petitioner's Sentence in Favor of Petitioner.

A. Sentences Which Fail Adequately to Specify Their Sequence Must Be Deemed to Run Concurrently

It is well settled that if a sentence "failed adequately to specify the sequence in which the . . . sentences were to be served . . . the sentences must be deemed to run concurrently." *Henley* v. *Heritage*, 337 F.2d 847, 848 (5th Cir. 1964). In *United States* v. *Daugherty*, 269 U.S. 360, 364 (1926), this Court noted that "[e]special care is essential where sentences for crime are imposed", and that such sentences "should reveal with fair certainty the intent of the

court and exclude any serious misapprehensions by those who must execute them." *Id.* at 363. Unless otherwise specified, multiple criminal sentences operate concurrently whether they are pronounced contemporaneously or at different times. *United States* v. *Wenger*, 457 F.2d 1082, 1083 (2d Cir.), *cert. denied*, 409 U.S. 843 (1972); *Borum* v. *United States*, 409 F.2d 433, 440 (D.C. Cir. 1967), *cert. denied*, 395 U.S. 916 (1969); *Schultz* v. *United States*, 384 F.2d 374, 375 (5th Cir. 1967). This salutary rule requires that a sentence be clear and definite, and, if the meaning of the sentence is in doubt, the presumption is that the sentences are concurrent.* Petitioner's second sentence fails to specify whether it is to run concurrently or consecutively with the special parole term imposed in connection with the first sentence.** Under settled principles, the special parole term must be construed to have run concurrently with the second sentence.

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* This presumption of concurrency has been adopted by many courts. *See, e.g., United States* v. *Wenger*, 457 F.2d 1082, 1083 (2d Cir.), *cert. denied*, 409 U.S. 843 (1972); *Borum* v. *United States*, 409 F.2d 433, 440 (D.C. Cir. 1967), *cert. denied*, 395 U.S. 916 (1969); *Schultz* v. *United States*, 384 F.2d 374, 375 (5th Cir. 1967); *Gaddis* v. *United States*, 280 F.2d 334, 336 (6th Cir. 1960); *Mills* v. *Hunter*, 204 F.2d 468 (10th Cir. 1953); *Buie* v. *King*, 137 F.2d 495, 500 (8th Cir. 1943); *McNealy* v. *Johnston*, 100 F.2d 280, 282 (9th Cir. 1938); *Neely* v. *United States*, 2 F.2d 849, 853 (4th Cir. 1924).

** The ambiguity of petitioner's second sentence is highlighted by the fact that many courts have recognized the necessity of specifically designating the sequence in which a special parole term is to be served. *See, e.g., United States* v. *Pratt*, 657 F.2d 218, 218 (8th Cir. 1981) (providing for consecutive terms of imprisonment to be followed by consecutive special parole terms); *United States* v. *Davis*, 656 F.2d 153, 155 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1979 (1982) (imposing two sentences, each including a special parole term, and providing that the second prison term commences on release *from confinement* on first sentence).

B. The Conclusion That Petitioner's Second Sentence and Special Parole Term Ran Concurrently Comports With the Letter and Spirit of the Law Pertaining to Special Parole Terms

Section 841(b) and its implementing regulation, 28 C.F.R. § 2.57, expressly provide that a special parole term imposed in connection with a violation of 21 U.S.C. § 841(a) is in addition to the period of imprisonment on the underlying offense and any parole therefrom. Moreover, interpreting the Drug Abuse Prevention and Control Act, the Court of Appeals for the Third Circuit has noted that "the language chosen by Congress for each penalty reflects a fully considered judgment and should be read carefully." *United States* v. *Mearns*, 599 F.2d 1296, 1297 (3d Cir. 1979), *cert. denied*, 447 U.S. 934 (1980). This is precisely the course followed by the district court when it determined that the statute does not provide a basis for resolving the ambiguity in petitioner's sentences.

It is a fundamental principle of statutory construction that federal courts "will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner* v. *United States*, 358 U.S. 169, 178 (1958); *accord Whalen* v. *United States*, 445 U.S. 684, 695 & n.10 (1980); *Simpson* v. *United States*, 435 U.S. 6, 15 (1978). Therefore, as recently stated by this Court, "[w]here Congress has manifested its intention, [the courts] may not manufacture ambiguity in order to defeat that intent." *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980). The Court of Appeals therefore erred in holding that imposition of an aggregate sentence *automatically* separates the special parole term from a previous drug sentence and adds the special parole

term to the end of the aggregate sentence.* Moreover, the decision is contrary to the legislative purpose in providing for special parole, which is reflected in its statement that "making the penalty structure in the law more flexible can actually serve to have a more deterrent effect than existing penalties . . . ." H.R. Rep. No. 1444, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News at 4576.

The Government's attempt to reincarcerate petitioner for violations of a parole term the existence of which was neither known by petitioner nor referred to by the sentencing court is patently unfair. This Court should review the important issues raised under the due process and double jeopardy clauses of the Fifth Amendment and infuse fairness and consistency into the sentencing procedures involving the Drug Abuse Prevention and Control Act.

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* Absent "statutory or constitutional authority to the contrary, a sentence runs continuously from its date of imposition." *In re Liberatore,* 574 F.2d 78, 90 (2d Cir. 1978).

Conclusion

For each of the reasons set forth above, this Court should grant a Writ of Certiorari.

August 23, 1982

Respectfully submitted,

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Memorandum and Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

81 Civ. 6731 (WK)

ADRIAN J. MASTRANGELO,

Petitioner,

—against—

UNITED STATES PAROLE COMMISSION, WARDEN DALE THOMAS, etc., et ano.,

Respondents.

WHITMAN KNAPP, *D.J.*

This is a petition for a writ of habeas corpus. Briefly, the facts—as we can cull them from the record before us—are these. On January 12, 1976 petitioner was sentenced—following a guilty plea—in the United States District Court for the Eastern District of Pennsylvania to a term of imprisonment of two and one-half years with a two year special parole term, for the distribution of narcotics in violation of 18 U.S.C. § 2 and 21 U.S.C. § 841. The relevant portion of the commitment order reads simply, ". . . imprisonment for a period of 2½ years, followed by a period of special parole as provided by statute of 2 years."

Almost two months later, on March 4, 1976, petitioner was again sentenced—this time after a verdict of guilty—by the same court to a term of imprisonment of one and one-half years, to run consecutively to the "sentence" imposed on January 12. The consecutive terms, therefore, aggregated to a total of four years of confinement. However,

petitioner was paroled from this aggregate term on October 7, 1977, and but for the special parole, his parole supervision would have terminated on January 8, 1980.

He was subsequently returned to jail on charges of having violated his special parole by acts said to have been committed in May of 1981. His claim before us is that his confinement is unlawful in that his special parole had expired before he is claimed to have violated it.

The crux of the argument is whether—as the petitioner contends—the word "consecutively" in his second judgment of conviction means only that the eighteen months is consecutive to the first jail term and that the special parole (which by statute was originally made consecutive to the first jail term) was running concurrently with the second term, or whether—as the government contends—the second term was interposed between the first jail term and the special parole.

We assume at the outset—without being required to rule on the question—that the sentencing court had the power to interrupt the first sentence (which included the Special Parole Term) in order to interpose the second eighteen months between its two and one-half year period of confinement and the Special Parole Term. *Cf In Re Libertadore* (2d Cir. 1978) 574 F.2d 78, 84; *In Re Grand Jury Proceedings* (*United States* v. *Thurmond*) (5th Cir. 1976) 534 F.2d 41. The question then, is whether the sentencing court intended to exercise this power. In this regard the second commitment order which states that its sentence "is to run consecutively to [the first] sentence . . ." is altogether ambiguous. It could not be assumed that the Judge literally intended his sentence to commence at the *end* of the first one, because under the statute the first did not *end* until after the termination of the Special Parole. *See* 21 U.S.C.

§ 841(c). No rational Judge could have intended the defendant to spend two years under Special Parole Supervision and then be returned to confinement regardless of his performance under supervision. Therefore we are left with the possibility (1) that the Judge used the expression "sentence" to mean "term of imprisonment" and simply wanted the two terms of confinement to run consecutively, without regard to the circumstance that this would reduce the prisoner's period of supervision, or (2) that, as the government here contends, he wanted to interrupt the original sentence and place the petitioner on Special Parole at the end of the aggregate confinement.

In these circumstances we are constrained by the principle that any ambiguities that may exist in a sentence be resolved in the prisoner's favor.[1] *United States* v. *Wenger* (2d Cir. 1972) 457 F.2d 1082, 1083-84. If the sequence is not adequately specified, the sentences must be deemed to run concurrently. *Henley* v. *Heritage* (5th Cir. 1964) 337 F.2d 847, 848. As the now Chief Judge of the Court of Appeals has observed, "[o]fficial inadvertence works in favor of the defendant." 457 F.2d at 1084.

For the reasons stated above the writ is granted and we direct that the petitioner be discharged. Should the government wish to apply for a stay of this order pending appeal, it should do so before 12:00 NOON on December 24, 1981 in Chambers.

So ORDERED.

Dated: New York, New York
December 23, 1981

/s/ WHITMAN KNAPP
Whitman Knapp, U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1113—August Term, 1981

(Argued May 4, 1982 Decided June 30, 1982)

Docket No. 82-2056

ADRIAN J. MASTRANGELO,

Petitioner-Appellee,

—v.—

UNITED STATES PAROLE COMMISSION, and WARDEN DALE THOMAS,

Respondents-Appellants.

Before:

FRIENDLY, KAUFMAN and PIERCE,

Circuit Judges.

Appeal by the United States Parole Commission from a memorandum and order of the United States District Court for the Southern District of New York, Whitman

Knapp, *J.*, granting petitioner a writ of habeas corpus pursuant to 28 U.S.C. § 2241.

Vacated and remanded.

CAROLYN SIMPSON, New York, N.Y., Assistant United States Attorney, Southern District of New York, (John S. Martin, United States Attorney, Southern District of New York; Richard Papper, Assistant United States Attorney, of Counsel) *for Appellant.*

BARRY R. OSTRAGER, New York, N.Y., (assisted by Thomas C. Rice) *for Appellee.*

PER CURIAM:

Following a plea of guilty to charges of distribution of narcotics in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2, petitioner Adrian Mastrangelo was sentenced on January 12, 1976, in the United States District Court for the Eastern District of Pennsylvania to 2½ years of imprisonment to be followed by 2 years of special parole. Special parole is mandatory whenever a prison sentence is imposed pursuant to 21 U.S.C. § 841(b)(1), (2). A few weeks later, on March 4, 1976, after conviction by a jury on charges of illegal possession of a firearm by a convicted felon in violation of 18 U.S.C. § 1202(a)(1), petitioner was sentenced in the same court, apparently by a

different judge,[1] to 1½ years of imprisonment, the court stating that "[s]aid sentence is to run consecutively to sentence imposed on [January 12, 1976]."

The two terms of imprisonment were aggregated by the United States Bureau of Prisons in accordance with sections 4161 and 4205 of Title 18 of the United States Code, and petitioner was considered to have begun serving the entire 4 years of imprisonment on January 12, 1976. He was paroled on October 7, 1977. Some time during May of 1981, after the period of regular parole had ended, petitioner committed certain "acts" which were regarded by the United States Parole Commission as violative of the conditions of special parole. The record does not reveal the nature of these "acts" or of the events that subsequently occurred before the Parole Commission. It seems apparent, however, that petitioner was incarcerated for the special parole violation. On November 2, 1981, petitioner filed a petition for a writ of habeas corpus in the District Court for the Southern District of New York. He claimed that the entire sentence imposed on January 12, 1976, *i.e.*, the 2½-year term of imprisonment followed by the 2-year term of special parole, ran without interruption. He argued that the 1½-year term of imprisonment imposed on March 4, 1976, was to be consecutive with the 2½-year term of imprisonment, but concurrent with the 2 years of special parole.

On December 23, 1981, the district judge granted the writ, finding that "the second commitment order which

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1 The only indication in the record as to the identities of the sentencing judges is contained in Mastrangelo's petition for a writ of habeas corpus wherein he states that sentence "#1" was imposed by "Newcumber" and sentence "#2" was imposed by "Hyuatt." We assume he means that the January 12, 1976, sentence was imposed by Judge Clarence C. Newcomer and the March 4, 1976, sentence by Judge Daniel H. Huyett, 3rd.

states that its sentence 'is to run consecutively to [the first] sentence . . . .' is altogether ambiguous." Judge Knapp stated that two possibilities existed:

> (1) that the Judge [who imposed the March 4th sentence] used the expression 'sentence' to mean 'term of imprisonment' and simply wanted the two terms of confinement to run consecutively, without regard to the circumstance that this would reduce the prisoner's period of supervision, or (2) that, as the government here contends, he wanted to interrupt the original sentence and place the petitioner on Special Parole at the end of the aggregate confinement.

Judge Knapp then stated that "any ambiguities that may exist in a sentence [must] be resolved in the prisoner's favor," citing *United States v. Wenger*, 457 F.2d 1082, 1083-84 (2d Cir.), *cert. denied*, 409 U.S. 843 (1972).

On December 30, 1981, the district court entered an order of judgment granting the writ. On February 26, 1982, the government filed its notice of appeal to this Court.

DISCUSSION

On these facts, we reject Mastrangelo's contention that the second sentence might have been intended to follow the 2½-year term of imprisonment from the first sentence, but to run concurrently with the 2-year term of special parole from the first sentence. Initially, the second judge's use of the word "consecutively" in the context of sentencing does not lend itself to such an interpretation. It is said against this that it is unlikely that the second judge would have intended the second sentence to follow all of the first sentence sequence, *i.e.*, 2½ years of

imprisonment, then 2 years of special parole, followed by the defendant returning to prison to serve an additional 1½-year term. Acceptance of that argument, however, does not create the ambiguity found by the district judge. It proves only that the second sentencing judge intended precisely what the Government contends, *i.e.*, that the two terms of imprisonment be aggregated into a four year term, to be followed by two years of special parole. This comports with the general implication of making an additional sentence consecutive rather than concurrent in that the total period of restraint is increased by the length of the second sentence. Moreover, consecutive sentences of imprisonment are always aggregated for various purposes, such as the computation of good time, *see* 18 U.S.C. § 4161. We must presume that the second judge also was aware of what was, at the time of sentencing, a well-established policy of the Bureau of Prisons to aggregate consecutive prison sentences to be followed by a term of special parole, where the earlier sentence involved a special parole term. *See* Bureau of Prisons Policy Statement No. 5330.3 § 5(b).

Additionally, in light of the nature and purposes of the congressionally-mandated special parole term provided for in 21 U.S.C. § 841, the second judge could not plausibly have intended to impose the sentence as interpreted by the defendant. The mandatory special parole term is designed to test the offender's ability to lead a lawful life in the community. Special parole "is not part of an original sentence of imprisonment and it is in addition to, and not in lieu of, any other parole available to the prisoner." *DiSimone v. Norton,* 404 F.Supp. 964, 966 (D.Conn. 1975). *See also United States v. Mack,* 494 F.2d 1204, 1207-08 n.3 (9th Cir. 1974), *cert. denied,* 421

U.S. 916 (1975). If the conditions of special parole are violated, the parolee is returned to prison to serve the entire special term, not merely that portion which remained at the time of the violation. This provides an additional incentive for the parolee to lead a lawful life in the community for an extended period of time, hopefully creating habits conducive to continuing lawful ways after expiration of the term. To permit the special parole term to run concurrently with an ordinary term of imprisonment would undermine this process. Nor is it an answer that the intended effect might be preserved if the prisoner is released on regular parole from a term of imprisonment during some or all of the time that the special parole term is claimed to be running concurrently, since it cannot be known at the time the second sentence is imposed that the prisoner's future behavior and the parole board's future decision concerning the prisoner's destiny will have led to his release on regular parole by the time petitioner claims the special parole term should commence. Thus the statute does not permit the interpretation of the second sentence that the defendant advances.

On the meager record before us, however, we are unable to determine whether petitioner was informed by the Parole Commission or otherwise became aware that, following the completion of regular parole, he would still continue under the Commission's supervision but on special parole status. We do not know whether he was told that he would still be obliged to report to a parole officer; nor do we know what "acts" petitioner committed which led to his reincarceration. In short, we are concerned as to whether petitioner was or was not actually aware of his special parole status and the terms and conditions thereof. This becomes especially important if

the acts he committed in May of 1981 were not in themselves criminal.[2]

If it develops that petitioner was not notified by the Parole Commission or otherwise made aware that he was still on special parole, he may have concluded that he was no longer under the Commission's supervision, in which event his reincarceration for a parole violation would be manifestly unfair and could require the granting of the writ. This conclusion would be bolstered if the acts which led to his reincarceration were the sort of "technical" parole violations described in note 2 set forth in the margin.

On the other hand, if it becomes apparent that petitioner was adequately made aware of his continuing status as a parolee and of the conditions of his special parole, he cannot now complain that the sentence was ambiguous.

Given the general purpose of parole, namely, supervising an offender's behavior during a period in which his ability to lead a law-abiding existence in society is tested, it is apparent to us that Congress' intention in enacting the special parole provisions included in the Drug Abuse Prevention and Control Act was that such parole would begin following the serving of all terms of imprisonment imposed upon an offender, and the completion of all regular parole periods. However, the offender must be made aware of his parole status and the terms and conditions associated therewith. A failure to do so may, at a minimum, seriously hamper the Commission from

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2 For example, possible grounds for revocation of parole include: "(1) failure to report to the United States probation officer; (2) failure to submit monthly supervision reports; and (3) failure to report change in residence [28 C.F.R. § 2.44] [These are sometimes referred to as] 'technical' violations." *United States ex rel. Carrasquillo v. Thomas*, 527 F.Supp. 1105, 1107 (S.D.N.Y. 1981).

enforcing the special parole provisions of a sentence against an offender. We would emphasize that while notification must be given, this does not impose a requirement upon the Commission to give an offender formal notice each time there is a status change. So long as it is apparent that the offender knew or reasonably should have known of his status on special parole and its terms and conditions, he can hardly complain of inadequate notice.[3]

We vacate the district judge's order of December 23, 1981, and the subsequent judgment of December 30, 1981, and remand the matter to the district court for an expansion of the record in order to determine whether petitioner adequately had been made aware of his special parole status and obligations when he committed the acts which purportedly were violations.

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3 If for example petitioner had continued to report to a parole officer after his term of regular parole had expired it could be reasonably inferred that he was aware of his special parole status.